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P Miss Peggy Buchanan
March 6. 1771.

17
8th March
Refus.

Unto the Right Honourable the Lords of Council and Session,

T H E
P E T I T I O N
O F

Miss PEGGY BUCHANAN eldest daughter of the deceased WILLIAM BUCHANAN of Carbeth,

Humbly sheweth,

THAT your petitioner, after a course of years spent in dutiful attention, first to her grandmother, then to her uncle, and lastly to her mother, has now, when those her relations are gone to their graves, the singular misfortune of being pursued in a process at the instance of her only brother John Buchanan-Kincaid, Esq; of Carbeth and Auchinreoch.

In this process your petitioner will be pardoned to say, That she has been treated with a *sevitia*, a harshness, that she hopes, for the honour of human nature, has seldom been shown by an only brother to a sister who never offended him, but who, on the contrary, was all kindness and affection towards him, and by her good management contributed not a little towards the increase of the riches of their common mother, to which he has been so lucky as to secure to himself the succession.

To justify these her complaints, she only entreats your Lordships attention to the purpose for which he is carrying on the present process, which is, to have his sister turned out of a small convenient possession upon the estate of Auchinreoch, of which his mother gave a task to your petitioner, and which the old lady, while her eyes were closing in death, consoled herself with the thoughts that her daughter would be allowed to enjoy in peace.

Had Mr Buchanan-Kincaid any rational purpose to serve by turning his sister a-drift; could he plead, in consistency with truth, any plans of improvement upon his maternal estate, with which your pe-

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tioner's

petitioner's tack interferes, minds not over-delicate in point of feeling, might bear without much indignation a recital of his conduct ; and interest, which has but too great influence over almost every mind, might be a kind of sanction to him. But when it is considered, that the pursuer has all the advantages that affluence of fortune can bestow ; that he has a noble entailed estate on which to keep up the representation of his family, and another estate free and unfettered, which will afford an ample fund of provision for his younger children, supposing him not to live long enough to lay up sufficient patrimonies for them out of the savings of his rents ; and besides both these estates, has an urban tenement in the city of Edinburgh, and his mother's whole executry, amounting to a sum very considerable : And above all, when it is considered that all the lands lying around your petitioner's small possession are locked up in leases of a long endurance, it is left with your Lordships to judge from what motives can proceed this domestic war :

Bella geri placuit nullos habitura triumphos.

The process against your petitioner having come before the Lord Auchinleck Ordinary, although the summons concluded not only for reduction of the tack, but also for reduction of a bond of provision granted to your petitioner by her mother, the pursuer thought proper to divide his action ; and waving *pro loco et tempore* the question concerning the bond of provision, he pointed all his artillery against the tack ; and producing a disposition in his favour to the estate prior to the date of your petitioner's tack, he contended that the same should be reduced, as flowing *a non habente potestatem*.

June 21. And upon that ground, he, on the 21st of June 1768, at a hearing
1768. of the cause, in which it was argued for him with much heat, obtained a judgment of the Lord Ordinary, decerning in the reduction.

It is well known to your Lordships, and to every body, who is well acquainted with the practice of this Court, that at the first hearing of a cause the information is very seldom full and accurate. A first hearing is considered as a skirmish, which cannot be very fatal to either party. People trust to the indulgence in point of time which the forms of Court allow, and it is only by degrees that the full merits of a cause expand themselves.

A representation was preferred for your petitioner, in which she humbly maintained, That as her tack was clothed with possession long before the pursuer was inest on his disposition, the former was a preferable right, as having been made real prior to the latter ; and this point was so firmly founded in law, that the pursuer had nothing

thing for it but to wheel about, change his ground, and confidently aver, that the tack in question was granted for an elusory tack-duty; that it was therefore to be considered as a deed elicited from the old lady *in fraudem* of the disposition to him.

In consequence of this *new plea*, which the petitioner urged with a very unbecoming keenness, parties went to proof; which having been reported to the Lord Ordinary, his Lordship was pleased, on the 20th of February 1770, again to decern in the reduction, and to ordain your petitioner to remove from the whole subjects as follows, *viz.* from the arable lands instantly, and from the houses and grass at Whitsunday next. To which interlocutor his Lordship was pleased, on the 11th of July 1770, to adhere, on considering representation and answers. Feb. 20.
1770.

July 11.
1770.

Another representation was preferred on the part of your petitioner, in which she humbly submitted to the Lord Ordinary a point which had not before been noticed, but which she was advised was very material in her defence, which was the *bona fides*, both of the old lady and of your petitioner, when they entered into the tack in question; from which it was clear, that the tack was not granted *in fraudem* of the disposition to the pursuer.

On considering this representation, his Lordship was pleased, on the 26th of July 1770, to pronounce this interlocutor: "The Lord July 26.
1770.
" Ordinary appoints this representation to be seen and answered,
" with respect to the allegation, that the representer was not in the
" knowledge that her mother had disposed the estate of Auchinreoch
" to the pursuer, without reserving a power to set tacks; on the
" contrary, from her mother's information, evidenced by the tenor of
" the tack, had reason to believe her mother had reserved that power,
" and consequently the representer was in *bona fide* to enter into the
" tack in question."

The petitioner flatters herself that at length the Lord Ordinary would view her cause in a favourable light. However, the great abilities of the pursuer's counsel put his cause in such strong and bold July 31.
1770.
colours, that his Lordship still adhered; and your petitioner saw that it was in vain to give his Lordship any further trouble, except praying him to supersede extract till the 2d federunt day of November.

The petitioner reclaimed to your Lordships, and answers having been put in to her petition, in which the pursuer was guilty of many misrepresentations in point of fact, she was under the necessity of applying to the Court for leave to give in replies, which your Lordships were pleased to allow.

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On considering the petition, answers, and replies, your Lordships were struck with the point of *bona fides*, as very material to the issue of the cause; and in order that a point so material might be cleared up, and it might be ascertained by solemn evidence, which of the parties had given the true, and which the false state of facts, it was moved by a respectable judge, that your Lordships should examine Mr William Sommervell writer in Glasgow, who alone could give your Lordships satisfaction. But the pursuer's counsel taking the alarm, moved, that the proof should not be confined to Mr Sommervell alone. Upon which your Lordships were pleased, on the 22d Dec. 1770, to pronounce the following interlocutor: "The Lords, before advising this cause, appoint the procurators for the respondent to give in a condescendence of what they offer to prove, to show the petitioner's knowledge of the disposition within mentioned, and of the terms thereof; and ordain the procurators for the petitioner to give in a condescendence of what they offer to prove, relative to her being ignorant of said disposition, or the terms thereof; both to be in the boxes on the 5th day of January next; and allow either party to give in answers to the other's condescendence, if they shall think fit, to be in the boxes on the 15th day of January next."

Mutual condescendences and answers having been given in, it was debated at some length among your Lordships, whether Mr Sommervell could be admitted to give testimony, as he had confessedly attended the proof in this cause on the part of your petitioner, and been aiding to her in furnishing her counsel with an authentic state of facts; so that as he had been in some degree her agent, the usual legal objection might lie against him. But the result of your Lordships deliberations was, that as Mr Sommervell was not a witness called by the petitioner, but suggested from the bench, the Court might with great propriety examine him *ex proprio motu*, he being an absolutely necessary witness, and indeed an *instrumentary witness* both to the disposition to the pursuer, and to the tack to the petitioner, and there being a great difference between witnesses when cited by parties, and witnesses called upon to give evidence *ad informandam conscientiam judicis*.

Your Lordships were pleased, on the 25th of January 1771, to pronounce the following interlocutor: "The Lords having resumed the consideration of this cause, they, before answer, allow William Sommervell writer in Glasgow to be examined in this cause, reserving all objections to the credibility of his deposition; and grant warrant for letters of first and second diligence, at the instance

“ stance of the petitioner, for bringing him before this Court, upon
 “ Saturday the second day of February next, when the Lords declare
 “ they will take his examination in their own presence ; and ordain
 “ the parties to prepare their interrogatories accordingly.”

Interrogatories having been given in by both parties, Mr Sommer-
 vell was accordingly examined in presence, upon Saturday the 2d,
 and Tuesday the 5th of February 1771.

Thereafter Mr Buchanan-Kincaid still persisting to harrafs his si-
 ster with the same degree of unrelenting severity, which it seems
 time cannot soften, put a note into the Lord President's box, pray-
 ing to have the consideration of the cause resumed.

In consequence of this, your Lordships were pleased, on the 13th
 February 1771, to pronounce the following interlocutor: “ The Feb. 13.
1771.
 “ Lords ordain the deposition of William Sommervell to be printed
 “ by Miss Peggy Buchanan, and at her expence, and the same to be
 “ put into the boxes against Saturday next ; with certification, that
 “ it will not be afterwards received without an amand of 40 s. Ster-
 “ ling.”

And, on the 26th of February 1771, your Lordships were pleased Feb. 26.
1771.
 to pronounce the following interlocutor: “ The Lords having ad-
 “ vised this petition, with the answers, replies, several condescen-
 “ dences for the parties, and the oath of William Sommervell, they
 “ decern and ordain the defender to remove from the whole subjects
 “ contained in the tack, at Martinmas next; and with that variation,
 “ adhere to the Lord Ordinary's interlocutors, and refuse the desire
 “ of the petition.”

As this interlocutor carries with it consequences extremely afflict-
 ing to your petitioner, and threatens a disappointment of the good
 intentions of the worthy old lady, the common mother of the pur-
 suer and petitioner, it is humbly hoped that your Lordships will not
 blame your petitioner for availing herself of the indulgence which
 the forms of Court allow, of once more bringing her cause under the
 review of your Lordships. This she has the more encouragement to
 do, that when it was last before the Court it was involved in such a
 multifarious mass of papers, that she is afraid the different points
 of her defence did not appear to your Lordships with that accuracy
 and distinctness which she would fain flatter herself they will now
 do, when stated in one paper, and brought into a narrower compass.

The points which the petitioner humbly means to submit to your
 Lordships are, *imo*, That upon a just and fair construction of the
 disposition by lady Auchinreoch to the pursuer, the old lady was
 not so totally divested of all power over her own estate, as not to

have a faculty of setting tacks thereupon, especially while the pursuer's title in virtue of the disposition was not rendered complete by investment. 2^{do}, That the tack granted to your petitioner can be by no means considered as granted for an elusory tack-duty. 3^{io}, That there was in this transaction the most perfect *bona fides* both on the part of the old lady and of your petitioner; and that this *bona fides* should give a sanction to the tack, upon the principle which has received the solemn authority of your Lordships, and affirmed in the last resort. 4^{to}, That your Lordships should at least have the several questions in dispute between your petitioner and her brother fully brought forward, before you pronounce a final judgment, by which she must be driven out, with all the violence that the law will allow, from that little quiet possession which her deceased parent prepared for the peaceable and comfortable accommodation of her dutiful daughter, while she should continue to live unmarried.

And with regard to the *first* point, it is to be observed, That the petitioner's mother has expressly bound herself and her representatives to warrant this tack at all hands and against all deadly. The petitioner is unquestionably a creditor to her mother's representatives in the warrandice of this tack. In case of eviction of the right, she is unquestionably founded in an action of damages, which she would be intitled to make effectual out of every subject her mother might leave behind her. In short, she falls to be considered, in consequence of her mother's obligation, as a most onerous creditor to her mother upon the warrandice of the tack; and as the pursuer is, by the deed in his favours, expressly burdened with the payment of every debt that should be due or prestable by his mother at her decease, so he must likewise be liable in the foresaid obligation of warrandice; and if so, he must thereby be barred from challenging the tack. He cannot be allowed to challenge a deed which infers warrandice against himself. The rule of law does, with submission, in this case apply, *Quem tenet actio, eum agentem repellit exceptio*.

But to apply the argument more particularly to the nature of the disposition granted to the pursuer: It does, with submission, appear, that no more was meant and intended by the aforesaid deed, than a settlement of succession, to save the trouble of making up titles *ab intestato* after the old lady's death. No more than a *nominal fee* was vested in the pursuer's person during his mother's life. As the pursuer is taken expressly bound to pay all the debts that should be due by his mother at her death, an unlimited *power of burdening* is thereby in effect reserved; so that the substantial fee of the estate did remain with the pursuer's mother; and it is impossible, with submission,

sion, that her disponent could be allowed to dispute any tack she might have granted of any part of the estate, with absolute warrantice to the tacksmen. When she had an unlimited power of burdening her disponent with debts, the obligation of the tack must likewise be a burden against him, and, it is humbly apprehended, must be an effectual bar to his insisting in any action by which the warrantice can be incurred.

Besides, by the foresaid disposition a conveyance is made to the pursuer, with the exceptions therein mentioned, of all the personal funds which his mother might be possessed of at the time of her death. This deed is plainly of a testamentary nature; and the old lady could certainly have altered it, at any time she thought proper, in so far as respected the moveable succession. And as she could have given away these subjects in what manner she thought fit, so all her deeds, whether onerous or gratuitous, must, with submission, be effectual against the pursuer, at least to the amount of the value of the moveable succession; and, after accepting of this deed and holding possession of the moveables, he cannot be allowed to insist in the present ungracious action.

It is very material for your Lordships to keep in mind, that no infeftment was taken by the pursuer upon the disposition in his favour during his mother's life, or for near a year thereafter; so that the petitioner's tack being long before the period of the pursuer's infeftment clothed with possession, it was the prior real right, and consequently is intitled to the preference in a competition with the pursuer's right.

It is, with submission, extremely plain, that as long as the disposition in favour of the pursuer remained a personal right, the mother remained proprietor of the estate, and her debts and deeds must have been effectual against it. If she had sold the estate, and the purchaser had been infeft before the pursuer, the purchase would have been good; and, for the same reason, must a tack granted while the mother remained vested in the property of the estate, and clothed with possession before any infeftment was taken upon the disposition to the pursuer, be sustained and preferred.

The only answer made to this was, That however that might hold in the case of onerous deeds, it cannot hold in the case of a tack granted for an elusory tack-duty, which the pursuer insists is the case here, and with respect to which a great deal of that clamour with which his proceedings in this cause have abounded has been thrown out.

And

And this leads your petitioner to the *second* point to be submitted to your Lordships consideration, *viz.* That the tack in question was not granted for an elusory tack-duty; and she will therefore proceed to argue that point in the best manner she can, which she hopes to do successfully, from the materials in process.

And here the petitioner must beg leave to make a previous observation, That there is nothing in which people are so apt to differ as in their opinions with regard to the value of land; so that the conjectural proof which has been brought by the pursuer, that some people think the petitioner's possession worth *L. 18, L. 20, L. 25* of yearly rent, does not afford convincing evidence that it is really worth even the lowest of these rents; for your Lordships will observe, that none of the witnesses who swear to these rents were in the prospect of paying them. Had they been in the contemplation of that, your Lordships need not doubt that a very different value would have been put upon the small parcels contained in this tack; for there is a wonderful difference in the notions of men, when a thing is to be paid for by themselves, and when it is to be paid for by their neighbours; or when, as in the present case, the settling a rent to be paid by any body in not in view, but the deciding a question with a sister, whom, possibly, the pursuer may have represented as a very injurious and unreasonable creature.

Were your Lordships to adopt the value put upon the petitioner's small possession by some of the pursuer's witnesses, it must be confessed that the tack-duty is indeed by much too low; but the pursuer must not flatter himself, that the slump value, mentioned by his witnesses, will be taken off his hand without due scrutiny and examination. The extent of the petitioner's possession has been ascertained by a measurement, and when all the little parcels of ground are taken together, they amount only to about twenty-four acres; and to make up that amount, Carbeth made his land-measurer comprehend ditches, and high-roads, and cow-loans; nay, a large gravel pit, and a considerable space thick set with planting, so that no use can be had of the grass of it. Upon that possession the pursuer's witnesses have taken upon them to put an estimation of very round sums.

But let their depositions be properly analyzed and dissected, and your Lordships will then be convinced that they have gone by far too high in their estimation.

John Kincaid of Kincaid, Esq; depones, p. 7. D. " That a tenant
" might, in the deponent's opinion, afford to give of yearly rent for
" the foresaid houses, yards, and grounds, for a nineteen years tack
" thereof,

" thereof, L. 14 Sterling yearly, and no more, on condition the tenant had liberty to sublet the mansion-house, and such parts of the grounds as he should think proper for potatoes." The same witness depones, p. 7. F. " That the park is excessively gooly." Your Lordships see here, even the rent of L. 14 yearly qualified with a condition; and the land is proved to be bad. And as this gentleman is the chief of the ancient family of the Kincaids, of which the family of Auchinreoch is a branch, and his estate within a mile of Auchinreoch, his testimony deserves particular attention.

James Stobo of Balgray, depones, p. 11. A. " That the pasturage grounds next the meadow is, some of it, good strong ground, and the rest of it a parcel of holes, and gullions, which he does not think worth the improving. Depones, That in his opinion, that part of the foresaid pasture-ground, which he thinks pretty strong ground, cannot, in its present state, be laboured without being first drained."

William Stirling, tenant in Mains of Auchinreoch, depones, p. 15. E. " That the park on the north side of the house of Auchinreoch, possessed by the defender, has been, ever since the deponent knew it, over-run with gool and other weeds."

James Fergus, in Roytfair, who is the pursuer's own officer, and therefore cannot be suspected of partiality to the petitioner, depones, p. 18. G. " That the ground of the foresaid north park is foul ground, that is to say, more gool grows in it then can be weeded for the value of the crop of victual, and has ever been so since he remembers."

These are the depositions of witnesses adduced by the pursuer himself, and what they swear in this way is corroborated by the depositions of the witnesses adduced by the petitioner.

Thus, Alexander Patrick in Woodside of Auchinreoch, depones, p. 20. C. " That a part of the lands called *Blackdike*, being the boggy part, is labourable, and a part thereof not labourable, without it be a dry season; and the deponent does not think that the Gullions are labourable, as it is mossy and wet. Depones, That there is a good deal of gool in the north park, and that he thinks if a crop of victual were growing on it, the gool could not be wed out of it, without spoiling the crop."

John Young, land-measurer in Balgrochan, depones, p. 22. G. " That the part of the lands called the *Gullions* are full of moss-holes, and the deponent thinks it will be expensive to level and drain the Gullions."

Sir James Stirling of Glorat, Bart. depones, p. 24. G. " That he knows these parts of the lands of Mains of Auchinreoch, which were in the natural possession of the deceased James Kincaid of Auchinreoch, and of Margaret Kincaid, his sister, the pursuer and defender's mother, and now in the natural possession of the defender; as also, the other parts of the said lands of Mains of Auchinreoch, now in the natural possession of William Stirling tenant there, and has known the same for many years past, but never narrowly viewed them till within these twelve months past, after he was cited as a witness for the defender in the present action, and for these many years past has lived at the distance of two miles from the house of Auchinreoch, where the said James and Margaret Kincaids lived, was well acquainted with both, and is well acquainted with the defender Margaret Buchanan, and has very often visited at the said house. Depones, That in his opinion the best acre of ground in the possession of the defender Margaret Buchanan, excepting two acres or thereby, in the haugh end, a piece of ground in the east end of the meadow, is worse in quality than any acre that is in the possession of the said William Stirling "

John Lapsley, tenant in Inchsterf, depones, p. 26. D. " That he knows the Gullions in the defender's possession, and that some parts thereof are so wet, that he had difficulty to travel through some parts thereof without being in danger of being laired, and other parts thereof are firmer, and that there are many holes in it, which appeared to the deponent to be peat-holes, or holes from which peats have been dug; and the soil of the Gullions is in the greatest part thereof moss to the surface. Depones, That he knows these parts thereof of the foresaid lands called the *Blackdike*, in the defender's possession, and that part thereof is dryfield, and part thereof is mossy, and that the dryfield thereof is stennery soil."

William Fergus, farmer in Guinzieburn, depones, p. 34. C. " That the Horse-grass is some old kind of holes, with fog and bent upon the high places thereof, from which holes the deponent judges peats have been cast; and in such places as the deponent made a trial in the Horse-grass with a spade, it appeared to him to be moss to the top of the surface. Depones, That there appeared to him when he viewed the Gullions, that a part thereof, about an acre or five rood of ground, on the west end thereof, might be labour-ed, if drained, but he cannot say it would be to advantage; and the rest of the Gullions consist of a parcel of holes and well-eyes, which he had difficulty to get travelling through; and that the whole of the Gullions, upon a trial, in sundry places, is moss to
" the

" the top, excepting the foresaid acre or five rood of ground, which
 " is not so mossy as the rest, but moss below.

Robert Ronald in Gateside, depones, p. 36. E. " That he lives
 " within a quarter of a mile of the house of Auchinreoch, and has
 " lived there for these six years past, and knows the lands of Mains of
 " Auchinreoch, in the defender Margaret Buchanan's possession;"
 and same page F. depones, " That the north park, in the defender's
 " possession, is very gooly and weedy."

There are also peculiar disadvantages attending some part of the
 petitioner's possession, which it is not in her power to remedy.

Thus Alexander Patrick depones, p. 20. E. " That the north yard
 " of Auchinreoch is surrounded on three sides thereof with a dike,
 " on the back whereof are full-grown planting standing, the drop
 " whereof, in the deponent's opinion, hurts that yard."

And John Young depones, p. 22. I. " That three sides of the
 " north yard, in the defender's possession, are surrounded with old
 " full grown planting; and that he judges the drop thereof, as well
 " as the roots of the trees, hurts the grass of the garden."

Here then your Lordships see, what kind of a possession it is that
 your petitioner has by this tack; and how the witnesses who have
 put the value of L. 18 or upwards upon it, have gone beyond all
 bounds; for how is it possible, that *the whole* can be worth a high
 rent, when your Lordships have it proved, even by those high-
 valuing witnesses themselves, that *its parts* are so bad? With what
 justice can they put a high value on a parcel of holes and gullions
 that are not worth the improving; on ground, from some of which
 peats have been dug; on ground, some of it mossy and marshy, where
 cattle cannot go for fear of lairing, and some of it a dry sandy stennery
 soil; on foul ground, over-run with weeds, so that more gool grows
 on it than can be weeded for the value of the crop of victual;—on
 ground riddled with well-eyes, and producing at best nothing but
 spritty and benty hay, while parts of it, where the grass is good,
 are destroyed by the drop of old planting?

Nor is it a small proportion only of the petitioner's twenty-four
 acres, that is so exceedingly bad; for your Lordships have it in
 proof, by the oath of William M'Leroy, who measured the petition-
 er's possession, that the Gullions alone measured seven acres and two
 roods, p. 16. G.

And it will not escape your Lordships in perusing this proof, that
 the witnesses for your petitioner, are all people living on the borders
 of the subject, and intimately acquainted with it; whereas, the
 witnesses for the pursuer are strangers, living at a distance, who, by
 their

their own confession, never turned up one spadeful of the ground to examine its quality, and who probably annexed to land lying at a distance from Glasgow, the same value with land in their neighbourhood, lying only a mile or two from that opulent and flourishing city.

From the tenor of the tack which has been already recited, your Lordships see, that the petitioner is bound to maintain the mansion-house and offices, wind and water tight, during the space of this tack, on her continuing to possess the same, and to leave them in that condition, at her removal. Now, it appears, from the oath of James Stirling of Craigbarnet, p. 3. D. "That the said mansion-house consists of two stories and garrets, wherein there is five bed-chambers, a dining-room, a large room on the ground-story unfinished, a cellar and kitchen, and some other little conveniencies for the use of a family; and further, the deponent knows, that there is a good stable built within these twenty years past, or thereabout, which will hold eight or ten horses, with a hay-loft above it, the whole length of the stable, having a stair without, leading up to the hay-loft, as also a barn and bire, all belonging as offices to the foresaid mansion-house:" And the same witness depones, p. 5. A. "That the rooms before deponed upon in the mansion-house of Auchinreoch, are over and besides the garrets." Such an extent of buildings, your Lordships know, will require no trifling sum to keep them in repair; and the expence of these reparations, together with the window-tax of so great a number of rooms, and which must be paid by the petitioner, being added to the hundred merks of money-rent, it is humbly submitted to your Lordships, if, all things considered, the petitioner does not pay sufficiently for her little possession.

Much stress seems to be laid by the pursuer on certain services prestable by the tenants and cotters on the estate of Auchinreoch; for he has been at great pains to bring a very ample and particular proof of them. But your Lordships will please be informed, that the petitioner has no claim to the benefit of any one of these services; so that they cannot be taken *in computo* of the value of her tack. On the contrary, though some of the good people, as appears from the proof, were so kind as to assist the petitioner with some little services the first year of her possession, she offered to pay them; and they are obliged to perform their services to the pursuer, or pay him an equivalent in money.

Your Lordships have just to consider the small parcels of ground, as described, with the disadvantages and burdens which have been
set

set forth, and then to judge if, upon the whole, this possession is set much at an undervalue, or what ought to be denominated an elusory tack-duty: In short, if there is such a *notabilis diminutio* of the rent as can by any means merit from your Lordships the *stigma* of being devised as a *fraudulent pretext*. The petitioner cannot take upon her to say what precise sum would be a just and an adequate rent for her little possession; nor would it be easy to form an accurate opinion thereof, from the proof that has been adduced. But what she humbly apprehends to be the material point for your Lordships consideration is this, Whether was the tack in question elusory *quoad* the parties contractors? Whether was it knowingly granted for an elusory tack-duty; that is to say, for a mock-rent, with intention to disappoint so far the disposition to the pursuer?

That this was certainly not the case the petitioner knows; and she hopes there are few gentlemen of the rank and fortune of the pursuer, who would doubt, or affect to doubt, a sister's word about such a trifle, far less set up their faces in the supreme Court of Justice of their country in direct opposition to it. But, as she is reduced to the hard necessity of being obliged to maintain every article in legal form, she flatters herself that there is satisfactory evidence to support what she maintains.

For your Lordships have it in proof, that the remaining part of the Mains of Auchinreoch is possessed at fully as cheap and easy a rent as the lands now in question are at the rent stipulated by the the fore said tack, which is so violently combated.

John Lapsley, aged 50, who has been a farmer from his youth, and who had very good access to know particularly the lands in question, as the farm which he has possessed for the space of 30 years lies contiguous to the Mains of Auchinreoch, depones, p. 26.F. "That in his opinion, the house " of Auchinreoch to be held wind and water tight by the " tenant, and the office-houses thereto belonging to be kept in that state, " with the yards and other grounds, presently in the possession of the " said Margaret Buchanan, when rented at 100 merks Scots yealy, is " equally dear to those parts of the Mains and the other lands of Auchinreoch, presently in the possession of the said William Stirling, " which he is informed are rented at L. 30 Sterling of silver rent, " 16 bolls of meal, 12 hens, the ploughing of six roods of land, aff " sitting in putting out the dung, leading coals and peats, and lead- " in in hay, and shearing corn to the master, in proportion with the " rest of the tenants and cotters of Auchinreoch."

James Miller, farmer at Guinziemill, whose possession marches, with part of the lands of Auchinreoch, and who has been a farmer

to his employment since the year 1738, depones, p. 31. G. "That
 " upon the supposition that William Stirling pays of yearly rent, for
 " the lands in Auchinreoch possessed by him, L. 30 Sterling of silver
 " rent, 16 bolls of meal, 12 hens, a sum not exceeding 16 s. Sterling
 " of minister's stipend, 20 d. Sterling of schoolmaster's salary, and
 " cess conform to L. 100 Scots of valuation, the tilling of six roods
 " of land, four days shearing of a person in harvest, leading a pro-
 " portional part of the coals and peats that are used at the house of
 " Auchinreoch, and winning, leading, and stacking of the hay that
 " grows in the foresaid meadow, alongst with the other tenants and
 " cotters of Auchinreoch, in proportion to their several possessions;
 " and also leading a proportion of the master's dung for his bear-land;
 " and also, upon a supposition that the said Margaret Buchanan is
 " bound to pay for her possession of the mansion-house and office-
 " houses of Auchinreoch thereto belonging, and of the two yards and
 " other grounds before described, 100 merks Scots money, besides
 " keeping the houses wind and water tight; does he judge that these
 " rents are equally dear? depones, That had he it in his choice,
 " he would rather take William Stirling's possession at the fore-
 " said rent and services, than take the defender's possession at the
 " 100 merks Scots, upholding the houses, and keeping the yards in
 " repair."

And William Fergus depones, p. 35. A. " Had he his choice, ei-
 " ther to take William Stirling's possession, or the defender's posses-
 " sion, at the respective rents foresaid, he would make choice of the
 " said William Stirling's possession, as the cheapest of the two
 " rents."

Your Lordships will please know, that by misfortune, the petitioner,
 when leading her proof, did not get evidence brought of the rent at
 which Ballwharige, an estate hard by Auchinreoch, was set; but, in
 order to supply this defect, there was produced before the Lord Or-
 dinary a letter to the petitioner, from Mr Fairfull the tacksman of
 Ballwharige, which she will here beg leave to ingross.

Madam,

In answer to yours concerning my tack of Ballwharige, Mr
 Wilson the proprietor, when he let it to me about seven years ago,
 told me that it was measured, and the number of the acres was sixty-
 four or sixty-five. It has a good house, a garden, besides some
 houses and yards for sub-tenants, for which I pay twenty-five
 pounds Sterling neat rent. I also have the carriage of forty loads of
 coals from any heugh in Campsey yearly, and a man eight days to
 make

make up the deficiency of any of my dikes, but I am obliged to give him his meat, the master pays the wages; the whole lands are surrounded by either stone dikes, ditches, or hedges; and there are two parks inclosed, about seven acres in each park. I have so often sown the same, that I am of opinion the measure is conform as Mr Wilson told me. It lies about six computed miles from Glasgow. My tack itself is at your service, to testify all that I have said about the rent.

I am, Madam, your most humble servant,

Ballwharige, 19th July 1770.

(Signed) JAMES FAIRFULL.

What has now been stated does, with submission, afford most satisfactory evidence, that the petitioner's mother acted seriously and fairly when she granted this tack. It is not surprising that she should not have been disposed to stretch matters against her own daughter, especially under the circumstances already mentioned. She could not surely be expected to exact from a daughter, so dutiful and affectionate as the petitioner, a higher rent than what she saw other lands in the neighbourhood were giving; and she had reason to think it was a favour to the pursuer to have the burden taken off his hand at such a rate, especially when his own sister was to be the possessor, with whom he might leave as long and as often as he pleased.

This is an age of project and amplification; every thing is strained, every thing exaggerated; trade has introduced a deal of artificial riches, and an exorbitant value is put upon land. Time will try the solidity of this wonderful increase. The petitioner means no offence when she presumes to say, that some of those who have raised their lands very high, have lived to find themselves no profitters upon the whole; and she cannot help thinking, but that the good lady her mother will not be blamed by the more solid and sagacious part of mankind, because she did not follow the high fashion in raising land, but let it at a moderate rate.

In the petitioner's humble apprehension, the value put upon tacks of land ought to be considered as equally uncertain, as the value put upon purchases of land. The petitioner means to apply this principle only to those very high values which your speculative projectors are pleased to fix; for who can set bounds to the fancy of projectors? Your Lordships well know what amazing prices several estates have given at judicial sales of late years before this Court. But would your Lordships reduce upon the head of enorm lesion the purchases made not a great many years ago of these very estates, by the people
who

who have drawn such immense prices for them? In the same manner would your Lordships reduce as elufory, tacks granted for very good rents, as times went, because your *improvers*, as they are called, think proper to put a much higher value upon them?

When your Lordships fee that all the lands in the neighbourhood were fet just at fuch a rate, nay, at a lower rate than the fubjects in queftion are fet by this tack, your Lordships muft, with great fubmiffion, be convinced, that both the old lady and your petitioner entered into the tranfaction with moft fair and honourable intentions, and had not the leaft idea that they were acting in *fraudem* of the difpofition to the purfuer; and fuch being the cafe, the petitioner does humbly maintain before your Lordships, that an after-conjectural proof, with regard to the fubjects fet, efpecially a proof which hangs fo ill together as the purfuer's, cannot influence the queftion. —The point is, Was this tack nothing elfe than a mock tranfaction, a *color quefitus*, to cover a fraudulent design?

If there is folid and fubftantial evidence before your Lordships, that the parties concerned in this tranfaction, a mother and her daughter, who looked around them, and faw how lands in the neighbourhood were fet, did confider this to be a fair and equal rent, fixed it to the beft of their knowledge, and would have fixed it higher, had they had any notion that they ought to have done fo; it would, with fubmiffion, be the hardeft cafe in the world to reduce a bargain entered into in fuch circumftances.

The *third* point for your Lordships confideration, and which the petitioner does humbly confider to be a very capital point, is the *bona fides* both of the old lady and of the petitioner when they entered into this tack.

This point will be weighed by your Lordships with very mature attention before you pronounce a final interlocutor againft the petitioner. Your Lordships will all remember how important this point appeared, when, in order to have it folemnly afcertained, the examination of *Mr William Somervell* was moved for by a refpectable judge, who, to the regret of his country, is much confined by indifpofition, and who was thereby prevented from being prefent when the caufe was laft before your Lordships. *Mr Somervell* has accordingly been examined; and notwithstanding the improper infinuations which the purfuer, contrary to the univerfal knowledge of the whole country, was pleafed to throw out, the petitioner can appeal to your Lordships, in whole prefence that gentleman, who has arrived at the venerable period of *feventy* years of age, was examined, if ever you faw an honefter or more candid witnefs.

Mr

Mr Somervell's deposition, the various particulars of which your petitioner has not yet had an opportunity to state to your Lordships, strongly corroborates the other circumstances tending to show the *bona fides* with regard to the tack in question.

The views of parties in this matter appear in the tack itself, where the ideas and sentiments of the worthy old lady are simply and faithfully told in the following words: "Whereas the said Margaret Kincaid has for several years past, and still continues to be in a bad state of health, and that *the said Margaret Buchanan her daughter, has been a dutiful child to her said mother, during her whole lifetime, and has carefully and assiduously attended her, during every illness she was taken with, the time before mentioned, and still continues so to do; therefore the said Margaret Kincaid, who is anxious to have her said dutiful daughter, so long as she continues to live unmarried, settled in a fixed place, where she may live peaceably and comfortably, doth hereby, in virtue of the powers reserved to her of setting tacks of her estate of Auchinreoch, in the disposition thereof to John Buchanan her eldest son, and also as heritable proprietor of the estate set, and in tack and in assignation let to the said Margaret Buchanan her daughter, for the causes before-mentioned, and for payment of the yearly tack-duty after written, all and whole the mansion-house of Auchinreoch," &c.*

An obligation had been granted by Lady Auchinreoch and the pursuer to your petitioner for a small annuity. This was the paper that your petitioner had occasion to peruse, and it served to confirm her in the belief that a power to set tacks was reserved in the disposition. For that paper which is signed by the pursuer himself contains the following clause: "Whereas I the said Margaret Kincaid, by disposition, of this date, and relative hereto, have disposed my lands and estate of Auchinreoch, lying in the parish of Campsie, and shire of Stirling, to the said John Buchanan of Carbeth my son, under several provisions, conditions, burdens, and RESERVATIONS." Here then the defender saw that the disposition contained not *one* reservation only, but *several reservations*. She knew for certain, that her mother had reserved a liferent of the estate; for her mother still continued to possess it; and she had the same persuasion that another reservation referred to was a reserved power of setting tacks.

Such is the *written evidence* with regard to the *bona fides* in this tack. And your petitioner cannot help thinking, that when duly weighed it is of considerable force. Indeed, unless the shocking presumption of the pursuer is to be adopted, *viz.* That the granting of the tack in question was "*a most tortious deed on the part of his mo-*

"ther," a presumption so insulting to the memory of his deceased parent, that it merits the severest censure.—Your Lordships must be fully persuaded that there was as perfect a *bona fides* here as can well be figured in any case.

But your Lordships have, over and above, very satisfactory evidence by the oath of *Mr William Somervell* of the circumstances relative to the transactions of this family.

It appears from *Mr Somervell's* deposition p. 2. C. "That it was the old lady's intention to settle her estate upon the pursuer's second son;" a fact which the pursuer has all along peremptorily denied, but which your petitioner has as peremptorily maintained. It is of this consequence, that it shows a very good cause why the pursuer was so anxious that the old lady should settle the succession of her estate upon himself, and accordingly he profited by a moment of apprehension which his mother had of the approach of death, she being of a timorous cast of mind. Thus *Mr Somervell* depones, p. 3. G. "That though the Lady Auchinreoch, as he has above deponed, said she thought herself a-dying when she employed the deponent to write her settlement: That he (the deponent) did not think her a-dying, and that upon a former occasion he had wrote another paper for her when she said she thought herself a-dying, but that in a few days after she was quite well again."

Such was the situation of the old lady at the time when she granted the disposition to her son; and what influence that son had then over her will appear to your Lordships from a circumstance, of which, one should think the pursuer should be ashamed, *viz.* his cruelly prevailing with his mother to restrict the petitioner's annuity. *Mr Somervell* depones, p. 4. 6. "That he remembers the mother at first proposed to make the annuity *L. 40*; but upon her son's remonstrating against so much, agreed to restrict it to *L. 30*: And when the deponent was making out the paper in another room, *Mr Buchanan* insisted with him, That it was reasonable there should be still a further restriction in case of her marriage; whereupon the deponent having said he could do nothing of himself, *Mr Buchanan* went up to the old lady, and soon thereafter the deponent was called upon, and told by her it was to be restricted to *L. 20* in the event of her (*i. e.* the petitioner's) marriage." Nothing can more strongly speak out the machinations of the pursuer than what has just now been quoted. *L. 40* a-year was surely a very moderate annuity to the eldest sister of a gentleman who had succeeded by the death of his father to an estate of about *L. 600* a-year, and who was just then getting secured to him by his mother the succession to another estate of about *L. 130* a-year: Yet he *remonstrates much* against his sister's

sister's having this annuity; nay, so very greedy is he, that his mind is galled and fretted that she should have even L. 30 yearly, and he cannot be satisfied till he gets a chance of having that diminished: And the chance which occurs to him is indeed a most unnatural one; for he will have the poor pittance of L. 30 yearly, restricted to L. 20 *in case of her marriage*; thereby discovering so fordid a turn, as, for the value of the trifling addition of L. 10 a-year to his large income to frustrate perhaps agreeable matrimonial plans, for settling his sister and increasing his own connections, or at least to render her situation more penurious in case she should enter into a marriage-state. And how easily does he effect this his unworthy purpose? Mr Somervell can do nothing; but up goes the pursuer to the room where his mother was lying in bed, under the pressure of melancholy fears; and, in the twinkling of an eye, he gains his point. The old lady is not able to stand out against his violent importunity, and the annuity is actually restricted to L. 20 in the event of your petitioner's marriage.

The old lady, however, having recovered from her indisposition, resumed her usual good sense; and having considered, that at the foresaid period she had not made up her titles to the estate, she now procured herself duly entered and inest in the lands; and by a deed, of date the 6th of January 1761, she, upon the narrative of the July 6. 1762 unreasonableness of the restriction of the petitioner's annuity to L. 20 Sterling in the event of her marriage, discharged the foresaid restriction, and bound herself, and her heirs who should succeed to her in the estate of Auchinreoch, to pay to the petitioner the yearly annuity of L. 30 Sterling during all the days of her life, and that as well married as unmarried, with interest from the terms of payment during the not payment; which last clause she thought necessary, as, by experience, she judged her son would be dilatory in his payments. This is the deed of which the pursuer libels a reduction in this process, which he wants to keep hanging over your petitioner's head; but it is hoped your Lordships justice will not allow him so to do.

How little your petitioner knew of the import of the disposition which the pursuer was so fortunate as to obtain, appears from several parts of Mr Somervell's deposition. He depones, p. 2. between G and H, "That Mrs Margaret Buchanan was not present at any of the communings between the deponent and the old lady;" and p. 4. between A and B, depones, "That the defender Miss Buchanan once came into the room and spoke to her mother; but what she said the deponent did not hear, being then, as now, dull of hearing; but remembers her mother ordered her out of the room. Depones, "he did not hear Miss Buchanan insist to have L. 40 of annuity,

" and that *her mother di not suffer her to interpose in the matter.*" P. 4. a little above H, he depones, " That he does not remember to have seen either Mrs Margaret Buchanan, or her sister, at the time when he read over the papers to her son ;" and a little under H, depones, " That Mrs Margaret Buchanan at that time made no inquiry at the deponent concerning the papers that were execute ; neither did the deponent read them to her, or tell her any thing of the matter."

A more natural picture of the simplicity and undefining state of a young woman, living in the country, and piously attending on her aged mother, cannot be exhibited. Your Lordships see the petitioner still treated in some measure like a child by her mother; ordered out of the room, and not allowed to have the least interference in business, even when she herself was most essentially concerned: and, in truth, there was little need of restraint towards your petitioner upon that head; for she never was one of those who are what is called *wordly wise*. Her days passed over her head with smoothness and tranquillity, amidst rural innocence and filial tenderness; and her mind was never troubled with those cares about money, with which, it seems, her brother has been so unhappily corroded.

From the period of granting the disposition till the period of granting the tack, neither the old lady nor your petitioner had an opportunity of seeing the disposition; nor could Mr Somervell, the lady's ordinary doer, put her in mind of the terms of the disposition; because, amidst the multiplicity of papers which a man of the extensive employment of Mr Somervell makes out, it is impossible he can carry in his head the particular terms of each; and he made no scroll of the disposition, nor had he occasion so to do, it being a common paper. And therefore, when Lady Auchinreoch executed the tack in question, the disposition to her son did not appear to her to stand in the way thereof; for she indeed had a firm persuasion that she had, as was most reasonable, reserved to herself powers of setting tacks.

Mr Somervell depones, p. 2. I, " That the defender never spoke to the deponent of her having a design to obtain from her mother the tack in question. Depones, When the old lady proposed to the deponent to make out the tack in question, she appeared to the deponent quite positive that she had reserved that power in the disposition; and the deponent, who had not seen the disposition from the time he had put it in the register, did not remember the contents of it; and trusting to the lady's accuracy, took it for granted that she had these powers; for *the deponent asked her specially, if she had these powers? and she answered, She was positive she had reserved them.* Depones, That after the tack was wrote,

" and

“ and Miss Buchanan was brought in to sign it, the deponent does
 “ not think there was any conversation about the mother’s power ;
 “ and, to the best of his belief, Miss Buchanan never had seen the
 “ disposition at that time : That Miss Buchanan did not desire the
 “ deponent to conceal her having got this tack. Depones, That the
 “ lady told the deponent she was to grant a tack of some small pen-
 “ dicle of the estate to a tenant : That he took a note of the terms,
 “ in order to extend it ; but as it was a small subject, he did not
 “ think it worth while to go back to Auchinreoch to get it signed,
 “ and the lady died without its being executed.”

Here your Lordships have full evidence how very groundless were all those foul aspersions, with which the pursuer has repeatedly loaded your petitioner in the course of this process, as if she had by undue means elicited the tack in question from her mother, and kept it a dead secret during her mother’s life, from the consciousness of its being an unjust transaction. Your Lordships see, that the granting of this tack was entirely a scheme of the old lady herself, and a most rational scheme it was to give her daughter, who had always been accustomed to a country life, a small and convenient possession upon her mother’s estate, as the pursuer had a good house to which he had made a large addition, and built a complete set of new offices for it upon the lands of *Carbeth*, which was his principal estate ; and where, as in duty bound, in order to keep up the representation of his father’s family in the country he proposed to reside for life : And your Lordships also see, that the petitioner never thought of concealing the tack, for indeed she never dreamed that there could be the least objection to it.

It seems however, that when the pursuer’s ill humour towards his sister rankled in his breast, because this little tack had been granted to her by their common mother, his views were totally changed. His paternal estate was then to be relinquished. He groaned under the reasonable restrictions of his entail, like a prisoner loaded with heavy irons ; and he pretended, that from regard to his younger children, he could lay out no money in improving his lands of *Carbeth*, because they were entailed ; forgetting, or seeming to forget all the while the late entail-bill, by which a remedy is provided in such circumstances. In short, *Auchinreoch* was all his desire, while, at the same time, as your Lordships have already been told, all the lands lying around your petitioner’s little possession are locked up in leases of a long endurance. His conduct is truly striking. It may be aptly compared to that of the great Jewish oppressor, who spared to

take of his own herds and flocks, and seized upon the poor man's ewe-lamb.

Your Lordships see the old lady quite positive with regard to her reserved powers of setting tacks. Your Lordships see Mr Somervell, the very writer who had made out the disposition, believed that such powers were reserved. Is there any wonder then, that your petitioner did also firmly believe they were so? Nay, your Lordships have not only the single instance of the tack in question, but it is proved, that the old lady, had not death prevented her, would have granted another tack to an indifferent person, a note of the terms having been actually taken. This is convincing evidence to your Lordships that the idea of her reserved powers was no assumed pretext by the old lady, on which she intended a plea of *bona fides* should be raised in favour of her daughter. It was her full and firm persuasion, and upon the faith of that persuasion, did she and her daughter, with a good conscience, and the fairest intentions, enter into the tack in question. The disposition not having been seen by the old lady for several years, and never having been seen, read, or heard, by the petitioner, was so far as concerns the point of *bona fides* in this tack a *latent deed*. The terms of it were *latent*, and that, with great deference, should be held as sufficient.

Indeed with submission, *res ipsa loquitur*, that both the old lady and the defender were persuaded that there was a reserved power to set tacks, for if that had not been the case, why would the one have granted and the other accepted of the tack in question? How would the mother's gray hairs have gone down in peace and comfort to the grave, in the belief that her dutiful daughter was to live in a settled place, just agreeable to her inclination? And how would the daughter have ordered all her affairs in such a manner, as to possess the small subjects contained in this tack, had they known that the tack might be challenged as an invalid deed? If they had not been convinced that the old lady could with effect grant the tack, that article would have been dropped, and the lady would have given her moveable estate to the defender, which she could have done the very day of her death, to a value ten times that of this tack. They surely would not impose upon themselves; and well they knew from disagreeable experience, that the pursuer would grant no favour, nor do any thing for his sister, which he was not strictly obliged to do.

As then there was here the most perfect *bona fides*, it is hoped that your Lordships will, upon a principle so amiable in itself, as giving a proper encouragement to candour in opposition to fraud and deceit, and which is so peculiarly applicable to the present case, be of opinion,

opinion, that the good intentions of the worthy old lady towards her dutiful daughter should not be disappointed, and that a tack entered into in such favourable circumstances will not be set aside by a court which boasts its powers of equity.

In the Dictionary of Decisions, *voce* TACK, the following one appears: "A tack being set after there was a few of the same land granted to another party, which feu was not known to the tacksmen, it was found, that the tack behoved to stand till it ran out, —BECAUSE OF THE TACKSMAN'S *bona fides*. Maitland; December 14 1570; Home *contra* Tenants of Oldhamstocks."

Here your Lordships determined *secundum equum et bonum*, the very point on which your petitioner pleads. And if such was your determination between indifferent parties, how much more must it be so in a question between a brother and a sister?

When the cause was last before your Lordships, one of the pursuer's counsel seemed in pretty flat terms to deny the reality of the decision now quoted. To this the petitioner answers, That it has been now for a considerable time understood that the Dictionary of Decisions is a book of authority in this Court, and there is one in the Court who is well able to defend its authority. If however there is an error with regard to this decision, as we all know *HUMANUM est errare*, it can be no very essential mistake. One name perhaps may have been put for another; but the learned compiler will not be supposed by your Lordships to have inserted as a decision of the Court what was not a decision of the Court. And indeed, if there is any little inaccuracy in transferring this decision from Maitland's manuscript, it does in reality strengthen the force of that decision; because it is a proof of its being a decision clearly founded on *principle*; for, had it been, with great submission, a strange, a dubious-like decision, that very circumstance would have called the particular attention of the learned compiler to it. He would have strictly examined it again and again, and the minutest *iota* of it would not have escaped him.

But this is not the only decision: For in the noted case of the relict of *Phisgill Heron contra Stewart*, 22d February 1749, collected by Mr Falconer, your Lordships found that the principle of *bona fides* secured to a relict the provision in her contract of marriage, though it was found that her husband had no right to the estate over which the provision was granted; and this decision was afterwards solemnly affirmed in the House of Peers.

From what has been stated then, your petitioner may be bold to say, that whenever the point of *bona fides* has come before your Lordships,

ships, whether in old times, or in the later periods of our law, it has never failed to obtain a favourable judgment. The pursuer is challenged to point out a single decision to the contrary, from the institution of the College of Justice to this hour. It is what he cannot do, for the principle of *bona fides* is so consonant to universal equity, that it must obtain in all ages, and in all countries, and hard indeed will be your petitioner's case if she shall be so unfortunate as to be made the first sacrifice, and notwithstanding her *bona fides*, be driven, by a merciless brother, from what she cannot help considering as her home, and be unexpectedly reduced to the woful situation of not knowing where to find a residence, such a residence as her mother made her expect, and for which her views and habits of living have been adapted. Your Lordships will forgive the anxiety with which a poor woman now deprived of both her parents endeavours to avert impending distress.

What renders her case a great deal more favourable, is, that the tack in question was truly a most onerous transaction, as she hopes to satisfy your Lordships.

In the *first* place, It is *ex facie* onerous, because the old lady narrates, " That the said Margaret Buchanan, her daughter, has been a dutiful child to her said mother during her whole lifetime, and has carefully and assiduously attended her during every illness she was taken with the time before mentioned, and still continues so to do."

Here your Lordships have a train of *prior services* by the petitioner to her mother, which founded her in a good claim of recompence. The petitioner does not mean to argue, that a parent is not intitled *ex pietate* to the attention and services of a child: But if a child has come the age of being *foris-familiated*, and, instead of going out into the world, and taking care to provide for her own interest, shall bestow her whole time and pains in taking care of the concerns of a parent; if such parent be in good circumstances, and well able to afford it, there does, with submission, thence arise a solid claim for a recompence. There are many instances of parents, in every department of life, who employ their own children in place of other people. It is extremely common for farmers to employ their own children as servants or day-labourers; merchants will employ them as clerks; and, in a word, your Lordships will find the same practice followed by people of most professions: And would ever a doubt be made whether such servants clerks, or others, are intitled to wages or salaries? Surely no. Supposing a father to become bankrupt, there can, with submission, be no question, that his children would, in such circumstances, be ranked amongst his onerous creditors.

Now,

Now, what is your petitioner's situation? It is most certain, and can be fully proved, if denied, that, for a long course of years, she attended upon the deceased lady Auchinreoch with the greatest assiduity during every illness which she had, and did besides manage all her affairs with the greatest care and oeconomy, not to mention that she did the same to her uncle the late *Auchinreoch*, to whom also the pursuer is heir. Upon the principles then both of the civil law and of the law of Scotland with regard to a *negotiorum gestor*, her claim is onerous; or let her even be considered as a *sick nurse*, or a *housekeeper*, she will be pardoned to say, that any small benefit which may accrue to her from this tack is surely little enough. It is true, that her mother might have made her a recompence in money; but as the old lady chose to do it in *forma specifica*, by granting her this tack, with which the petitioner, as her views were moderate, was exceedingly well satisfied, it is humbly hoped that full effect should be given to it.

But, in the *second* place, The tack in question is onerous, for this very good reason, that the old lady was possessed of personal funds to the value of above *L. 400* Sterling, over all which she had power to the last moment of her life, and which she would have undoubtedly settled, or at least the greatest part of them, upon your petitioner, had she not believed that the tack would be effectual to her; so that as this tack was granted in lieu of something much more valuable, it must undoubtedly be considered as onerous. And, as the old lady binds herself in absolute warrandice, the damage arising from the eviction of the tack must be made good to the petitioner by her brother, out of her mother's personal estate.

Was it not an onerous transaction between Lady Auchinreoch and the pursuer, when she conveyed to him a valuable personal estate, and, in consideration of her having done so, took the privilege of setting a small tack on the estate which she had gratuitously disposed to him, but to which his right was not yet rendered real by investment? And after holding possession of this valuable personal estate, which his mother might have disappointed him of *ad extremum vite balitum*, is it not contrary to justice and good faith, that he should now, when his mother's head is laid in the dust, be allowed to reduce a rational tack, executed by her in confidence that he was barred from challenging it?

The pursuer talks of the elusory rent in this case, though it is proved that the petitioner's little possession is set as high as the other lands in the neighbourhood. But allowing the rent to be low, the pursuer should keep in mind the large *grassum* which he got. The

petitioner does maintain, that her mother's personal estate is to be considered in the light of a *grassum*, as it was disposed to him, rather than to the petitioner, for this very reason, that the petitioner was to have the tack in question. Let the *grassum* then be kept in view; and then let it be fairly judged, if this is a bad bargain upon the whole. Your Lordships know, that many people rather choose to have a good *grassum* in hand, and let their lands at a moderate rent, than to have no *grassum*, and let their lands at a racked rent.

The *fourth* point for your Lordships consideration, is, Whether in a question between two such near relations, and attended with such peculiar circumstances of hardship, it will not be reasonable to delay giving a final judgment till the several points in dispute between the parties are fully brought forward?

In the present summons, the pursuer concludes for reduction of the bond of annuity to your petitioner, whereby the unreasonable restriction in case of her marriage is taken off. Surely your Lordships will not countenance his thus dividing his action, and harrassing his poor sister by piecemeal. She is very unable to maintain an expensive litigation against him; and as his motives are but too evident, common justice and humanity should, with submission, interpose to prevent them from taking effect.

The petitioner has again, on her part, a summons against the pursuer, which has been called before the Lord *Hailes* Ordinary; in which she concludes, *1mo*, That the pursuer should be decerned to make payment to her, with interest, of the just and equal half of the portions of Moses and Jean Buchanans, her deceased brother and sister, provided to them by their father's settlement, and which it is thereby provided should accresce equally to the surviving younger children, of which your petitioner is one of two: *2do*, To make payment to her of what she has laid out upon the faith of a bond granted by the late deceased James Kincaid of Auchinreoch to his three natural children, who remained in family with your petitioner's mother, and have since her death been boarded, clothed, and educated by your petitioner; as also to make payment to your petitioner of the sum contained in that bond yearly, until the pursuer shall, in terms thereof, put the said children to apprenticeships: *3tio*, That, in the event of the tack now in question being reduced, the pursuer should be found liable to your petitioner in the damages she may thereby sustain, and that out of his mother's valuable personal estate, in virtue of the absolute warrandice in which the old lady bound herself and her heirs.

These points, especially the last, have such a contingency with the present

present question, that it is humbly apprehended your Lordships will think it highly reasonable that they should all be determined at one and the same time ; and that the pursuer and your petitioner may have an end put to their differences by legal decerniture, since they cannot be amicably settled. And indeed, if it shall appear that the damages arising to the petitioner from eviction of the tack is not equal to the value of the subjects, which Mr Buchanan has taken out of his mother's personal estate, it will then come to be a question very well meriting consideration, how far Mr Buchanan, holding his mother's personal estate, is at liberty to challenge this tack ? The rule of law would, in that case, apply, *Quem tenet actio, eum agentem repellit exceptio*. It can be no pleasure to your Lordships to see this unnatural warfare ; on the contrary, it cannot but be painful, to have an only brother and his sister thus litigating with so much heat, while the one throws out clamour, and the other complaints of oppression. It will surely be thought better, that your Lordships calm and impartial interposition should moderate and allay this unhappy warmth ; and that, having the whole disputes before you, your Lordships should at once settle the whole.

But from the state which your petitioner has since now been able to give of her cause, she is humbly hopeful that your Lordships will see good grounds for sustaining the tack in question.

May it therefore please your Lordships, to alter your former interlocutor ; and in respect that the tack in question was a real right prior to the pursuer's disposition, that the rent was not c-lusory, and that it was moreover granted for onerous causes, and also in respect of the perfect bona fides, to assilzie from the reduction thereof ; or at least to supersede finally determining the same till the other points in dispute between the parties are before your Lordships, so that all questions between an only brother and his sister may be at once put out of Court.

According to justice, &c.

JAMES BOSWELL.

ADDITIONAL